NO. 48504-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMIN LEE SCHIPPER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 15-1-03117-3

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Considering the entire prosecution argument in context, has defendant shown that the prosecution's arguments were improper, or that the court abused its discretion when it ruled on the defense objections, or that any improper argument substantially affected the jury's verdict?

2. Should appellate costs be awarded to the State if it prevails in this appeal?

B. STATEMENT OF THE CASE.

1. Procedure

On August 10th, 2015, Jamin Lee Schipper (the "defendant") was charged with Robbery in the First Degree (Count I) and Felony Harassment (Count II). CP 1-2. The case proceeded to trial before the Honorable Kathryn J. Nelson on November 30, 2015. 1RP 3.

Testimony concluded on December 1, 2015. 2RP 294. The parties delivered closing arguments the next day. The defense objected once during the State's closing and twice during the rebuttal. 3RP 314-5, 348-9, 351. Each objection was sustained and the court issued immediate instructions to remedy any potential jury prejudice. *Id.*

The jury was instructed on the charged crimes as well as the lesser included offenses of Robbery in the Second Degree and misdemeanor Harassment. CP 33, 43. The jury deliberated and returned guilty verdicts

on the lesser charges. CP 9-11, 14-5. Additionally, the jury returned a special verdict finding defendant was armed with a deadly weapon when he committed the robbery. CP 13.

On January 8, 2016, the defendant was sentenced to a standard range six month sentence for the robbery, plus 12 months for the deadly weapon enhancement, and 12 months suspended for the harassment. CP 72, 81-2; 5RP 389. The court imposed $800 in mandatory legal financial obligations (LFOs) and waved all discretionary LFOs. 5RP 389. Defendant filed this timely appeal on February 1, 2016. CP 85.

2. Facts

On August 10th, 2015, defendant entered Saar's Marketplace, a grocery store in Pierce County, Washington. 2RP 175-6. Defendant sang "very loudly" through the store, eventually making his way to the beer section. CP 175-7. After grabbing a Heinken mini keg and a 12-pack of bottled beer from the store's case, he started to walk out the door without paying. 2RP 177.

The on-duty cashier at the time, Tiffany Kellogg, called for him to stop and pay for the items. 2RP 177. Despite Mrs. Kellogg's calls for him to stop, defendant continued out of the store into the parking lot. 2RP 177-8. Mrs. Kellogg activated a store alarm to notify police of the incident and followed defendant into the parking lot to confront him.

Mrs. Kellogg, now joined by other employees and a customer in the parking lot, implored the defendant to return the items to her.

Defendant turned to face her, reached back with the hand holding the keg and forcefully swung the keg at her— narrowly missing her head. Mrs. Kellogg fell back while dodging the keg. 2RP 185. Defendant looked at her, reached back into the waistband of his pants, and told her he would shoot and kill her. CP 186. Mrs. Kellogg fled back inside the store in response to the defendant's threats and cooperated with police once they arrived. Police found defendant nearby the store still in possession of the beer. CP 281-2. Defendant attempted to flee from police, but was quickly captured and arrested. CP 282-4.

C. ARGUMENT.

1. CONSIDERING THE PROSECUTION'S ARGUMENT IN CONTEXT, THE DEFENDANT HAS FAILED TO SHOW AN ERROR THAT WAS SUBSTANTIALLY LIKELY TO HAVE AFFECTED THE JURY'S VERDICT, OR AN ABUSE OF DISCRETION IN THE TRIAL COURT'S RULINGS ON DEFENSE OBJECTIONS.

In a claim of prosecutorial misconduct, the defendant bears the burden of establishing both the impropriety of the prosecutor's argument and its prejudicial effect. ***State v. Brett***, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), citing ***State v. Furman***, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993); *see also* ***State v. Hoffman***, 116 Wn.2d 51, 93-95, 804 P.2d 577 (1991). Challenged "arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the

argument, and the instructions given." ***State v. Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *citing* ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990); ***State v. Green***, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986); *see also* ***State v. Warren***, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008). During closing argument, the prosecutor is given wide latitude to draw reasonable inferences from the evidence. ***In re Pers. Restraint of Glasmann***, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Misconduct is not prejudicial unless the Court finds a "substantial likelihood" that it affected the jury's verdict. ***State v. Evans***, 96 Wn.2d 1, 5, 633 P.2d 83 (1981).

Where a defendant objects, the standard of review is abuse of discretion. ***State v. Gregory***, 158 Wn.2d at 809. If impropriety is found, prejudice is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), quoting ***State v. Pirtle***, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). In determining whether prosecutorial misconduct resulted from a prosecutor's comment to the jury, appellate courts first evaluate whether the comment was improper. ***State v. McChristian***, 158 Wn. App. 392, 400, 241 P.3d 468 (2010), citing ***State v. Reed***, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If it was improper and the defendant made a proper objection, then appellate courts consider whether there was a substantial likelihood that the comment prejudicially affected the jury's verdict. *Id.*

a. The prosecutor properly drew inferences from evidence presented at trial when summarizing witness testimony.

"There is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case." ***State v. McKenzie***, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). "In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of the witnesses and arguing inferences about credibility based on evidence in the record." ***State v. Millante***, 80 Wn. App. 237, 250, 908 P.2d 374 (1995), citing ***State v. Hoffman***, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). While misconduct occurs when the prosecutor expresses a personal opinion about witness credibility during closing argument, "[P]rejudicial error will not be found unless it is clear and unmistakable that [the prosecutor] is expressing a personal opinion." ***State v. Brett***, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); ***State v. Copeland***, 130 Wn.2d 244, 290, 922 P.2d 1340 (1996) (citing ***State v. Swan***, 114 Wn.2d 613, 664, 790 P.2d 610 (1990); ***State v. Reed***, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)).

A prosecutor properly "may argue ... inferences as to why the jury would want to believe one witness over another. ***State v. Brett***, 126 Wn.2d

at 175; *see also* ***State v. Luoma***, 88 Wn.2d 28, 40, 558 P.2d 756 (1977); ***State v. Jefferson***, 11 Wn. App. 566, 524 P.2d 248 (1974); ***State v. Warren***, 165 Wn.2d at 30 (Argument that details from the victim's testimony "gave it a badge of truth and ... rang out clearly with truth...." was not improper.); contrast ***State v. Sargent***, 40 Wn. App. 340, 343, 698 P.2d 598 (1985) ("I believe him ...There was no other reason he would be testifying...." improper.).

In this case, the prosecution argued that defendant committed first degree robbery when he swung a heavy, blunt, stolen beer keg at the grocery store cashier. 3RP 317-8. The defendant admitted having stolen the keg, but denied threatening the cashier and argued that the keg was not a deadly weapon. 2RP 289; 3RP 338-40.

The defense argument attacked the reliability and credibility of the witnesses who testify to seeing the defendant swing the beer keg at the cashier. 3RP 343-4. During rebuttal, the prosecutor pointed out reasons and argued that the witnesses were credible and their testimony about the swinging of the keg should be believed. 3 RP 350-352. Defendant objected to three of the prosecutor's statements, each objection was ruled upon. 3RP 314-5, 348-9, 351. The trial court's rulings were reasonable and cautious; the court referred the jury to their instructions on one occasion, and in the others allowed the prosecutor to place his statements in the context of the jury instructions. 3RP 314-5, 348-9, 351.

The defendant argues that the prosecutor vouched for witness credibility when he made the following argument:

> MR. HILL: He did what he did because he wanted to keep the beer and he wanted to use violence in order to keep it. It's that simple. Now, you know that from all those witnesses. What does the defendant have to say about that? I didn't do any of that other than steal the beer. I went out the door. I ran across the parking lot, and I hid and the cops were there like that. That's his version of it. Now, if you want to believe his version of it, that's fine. What that means is he's guilty of theft third. Okay. If you believe his version. There is not a person in this room that's going to believe that. You heard it from too many witnesses. They were credible witnesses.
> MR. CURRIE: Objection, Your Honor.
> MR. HILL: They are not here with an ax to grind against anybody.
> MR. CURRIE: Objection, Your Honor.
> THE COURT: —the opinion of credibility of the witnesses—
> ...
> MR. HILL: All right. I'm -- okay. *Just to be clear, I'm not expressing my opinion. I'm expressing what you're going to find. You will find, based upon what they said from that witness stand, from their demeanor, from what they said, how they delivered it to you, that they are credible.* And if you do, you're going to believe what they had to say. If you believe what they had to say, then that's what happened.

RP 313-5(emphasis supplied)

Viewed in context and with the overall argument and the jury instructions in mind, the prosecutor was arguing legitimate inferences from evidence presented at trial. The prosecutor's statements were made in the course of describing the witnesses' testimony. The prosecutor referred to the witnesses' consistent accounts and their demeanor on the

stand to urge the jury infer that people with consistent accounts and certain body language should be viewed as credible. The statement about "an ax to grind" is nothing more than a rhetorical allusion to the witnesses' lack of motive to fabricate. The argument would have been neither more nor less proper if the prosecutor had instead referred to the lack of improper motives such as a personal grudge against the defendant. Both arguments say the same thing and are not improper.

This argument falls well short of an unmistakable expression of a personal opinion when viewed in the total context of his argument. The prosecutor made inferences from the available evidence about the value of particular witness testimony. He did not inject a personal opinion about his belief in the testimony.

Defendant is similarly unable to demonstrate prejudice. Although the prosecutor's argument in context was not improper, the trial court cautiously ruled on the objections in a manner calculated to emphasize the primacy of the jury instructions and evidence. Thereafter, the prosecutor clarified what he meant in light of the instructions and evidence. The prosecutor explicitly stated what was likely already clear, that he was arguing inferences from testimony presented at trial. Defendant has failed to demonstrate any error, or prejudice resulting from any alleged error.

b. The prosecutor properly argued the burden of proof in the context of the jury instructions.

Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. ***State v. Warren***, 165 Wn.2d at 26. In 2007, the Washington Supreme Court expressly directed trial courts to use Washington Practice: Washington Pattern Instruction: Criminal (WPIC) 4.01 to inform juries of the State's burden to prove beyond a reasonable doubt every element of a charged crime. ***State v. Castillo***, 150 Wn. App. 466, 467, 208 P.3d 1201 (2009) (citing ***State v. Bennett***, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007)). WPIC 4.01 reads in relevant part:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Here, the court instructed the jury on the definition of reasonable doubt and the State's burden of proof as contained in the pattern instruction. CP 22.

A prosecutor's arguments constitute misconduct if they "shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt." ***State v. Lindsay***, 180 Wn.2d at 434. Here, after reading the reasonable doubt jury instruction, the prosecutor stated:

> **MR. HILL**: ... [I]t's a difficult concept [reasonable doubt]. But let me suggest to you, if you believe something in your heart, in your gut, in your mind, you're there.
> ...
> So that's my suggestion on how you approach it. You can approach it whatever way you want, but that's my suggestion on how you try to deal with that particular issue.
>
> **MR. CURRIE**: I'm going to object to that, Your Honor.
>
> **MR. HILL**: I think I used the words I suggest.
>
> **THE COURT**: Yes, you suggested and the jury should follow the instructions.
>
> 3RP 351-2.

The prosecutor's comment suggested a contextual framework for approaching the reasonable doubt standard. In ***State v. Curtiss***, 161 Wn. App. 673, 250 P.3d 496 (2011), this court found that a similar heart and gut comment did not constitute misconduct. There, the prosecutor stated during rebuttal closing argument, " 'Consider all the evidence as a whole. Do you know in your gut – do you know in your heart that [the defendant] is guilty as an accomplice to murder? The answer is yes.' " *Id.* at 701. This court concluded that "the State's gut and heart rebuttal arguments in this case were arguably overly simplistic but not misconduct." *Id.* at 702.

Additionally, here the prosecutor did not introduce quantitative elements to the standard of proof, compare it to everyday decision making, encourage the jury to "speak the truth," or use any other tactic that has been found to trivialize the burden of proof. *See,* ***State v. Lindsay***, 180

Wn.2d 423, 434-7, 326 P.3d 125 (2014); ***State v. Johnson***, 158 Wn. App 677, 682, 243 P.3d 936 (2010); ***State v. Anderson***, 153 Wn. App 417, 431, 220 P.3d 1273 (2009); ***State v. Walker***, 164 Wn. App 724, 732-33, 265 P.3d 191 (2011).

The defendant has also failed to demonstrate that the prosecutor's remark prejudiced the jury's verdict. "Juries are presumed to follow instructions absent evidence to the contrary." ***State v. Dye***, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). The jury received the proper instruction on the reasonable doubt standard. CP 22. On defense counsel's objection, the trial court acknowledged that the prosecutor had made a suggestion and directed the jury to follow their instructions. 3RP 351-2. Because the proper instruction was given, and the jury is presumed to follow their instructions, defendant has not met his burden of demonstrating that the jury verdict was prejudicially affected by any presumed error by the prosecutor.

c. <u>The prosecutor properly drew inferences from evidence presented at trial in summarizing witness testimony.</u>

An attorney's allegedly improper remarks are reviewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." ***State v. Anderson***, 153 Wn. App 417, 427, 220 P.3d 1273 (2009), citing ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994)). A prosecutor is

permitted to call on a jury to "do justice" if the statement was made in the context of jury instructions explaining the jury's role in evaluating the evidence. *Id.* at 429.

Here, during closing argument the prosecutor said:

> **MR. HILL:** Two concepts that I give every jury that I think are more helpful to them than anything else that I say. Number one is team work. You're a team. You may not think of it that way yet, but by the time you're done, you're going to realize, because you came in here with a goal, and every one of you came in here with the same goal, and that's to do justice. There's not a person in this room who doesn't want to do justice. That's why you're here.
>
> **MR. CURRIE**: Objection, Your Honor.
>
> **THE COURT**: I'm going to sustain.
>
> **MR. HILL**: All right. You're here to do justice.
>
> **MR. CURRIE**: Objection, Your Honor.
>
> **THE COURT**: Sustained.
>
> **MR. HILL**: *Within the confines of the jury instructions, you're in a search to try to figure out what happened and how it applies to the jury instructions so you can come up with the right verdict.* Everyone else is here to do the same thing. When you're doing that, it means that your fellow jurors have the same goal that you do. So in doing that, you'll have opinions about what you think you saw or heard from the witness stand, and so will your fellow jurors. If you have a difference of opinion, listen to what they have to say.

5RP 348-9(emphasis supplied)

Here, the prosecutor's statement calling on the jury to "do justice" was given within the context of the jury instructions and, therefore, is very similar to the statement made in ***State v. Anderson***, 153 Wn. App at 427. In both cases, the prosecutor was not prodding the jury to act outside its instructions. ***State v. Walker***, 164 Wn. App 724, 733, 265 P.3d 191 (2011)(Asking a jury to "declare the truth" misstates the jury's obligation to find guilt beyond a reasonable doubt.). Any potential misconduct was remedied by defendant's objection, the trial court's ruling, and the prosecutor immediately referring to the instructions.

"Juries are presumed to follow instructions absent evidence to the contrary." ***State v. Dye***, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). The defendant has also failed to demonstrate that the prosecutor's remark prejudiced the jury's verdict. The jury received the proper instruction concerning their role in evaluating the evidence before them. CP 17-8. Because the proper instruction was given and the jury is presumed to follow their instructions, defendant has not met his burden of demonstrating that the jury verdict was prejudicially affected by any presumed error by the prosecutor.

2. THE STATE HAS NOT REQUESTED AN AWARD OF APPELLATE COSTS AND THIS COURT HAS THE DISCRETION TO AWARD COSTS IF A COST BILL IS FILED.

The State has not yet requested an award of appellate costs. The State agrees with defendant that this court has the discretion to grant or deny a request for appellate costs once a cost bill has been filed. ***State v. Nolan***, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). Should the State prevail in this appeal and file a cost bill, defendant may object to the cost bill.

The decision of whether to award appellate costs is the prerogative of this court in the exercise of its discretion under RCW 10.73.160 and RAP 14.2. An award of appellate costs does not require an individualized finding of the defendant's ability to pay. ***State v. Sinclair***, 192 Wn. App 380, 389, 367 P.3d 612 (2016)("Ability to pay is certainly an important factor that may be considered under RCW 10.73.160, but it is not necessarily the only relevant factor, nor is it necessarily an indispensable factor."). By statute, trial courts are authorized to impose trial-related LFO's and appellate courts are authorized to impose appellate costs. These statutes can and should be viewed as an expression of the preference of the legislative branch that criminal defendants pay at least a portion of the cost of the criminal justice system. This Court should exercise its discretion with that preference in mind and secure in the knowledge that the defendant has a statutory right "at any time" to petition for remission of

any appellate costs that may "impose manifest hardship" on the defendant. RCW 10.73.160(4).

D. CONCLUSION.

For the foregoing reasons, the defendant's conviction and sentence should be affirmed.

DATED: Monday, November 14, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

Neil S. Brown
Appellate Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11-14-16 Teresa Kay
Date Signature

PIERCE COUNTY PROSECUTOR

November 14, 2016 - 2:17 PM

Transmittal Letter

Document Uploaded: 1-485044-Respondent's Brief.pdf

Case Name: State v. Schipper
Court of Appeals Case Number: 48504-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

tom@washapp.org
wapofficemail@washapp.org